

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
In Local Telecommunications Markets)	
)	
Wireless Communications Association)	
Petition for Rulemaking to Amend)	
Section 1.4000 of the Commission's Rules)	
)	
Cellular Telecommunications Industry)	
Association Petition for Rulemaking)	
and Amendment of the Commission's)	
Rules to Preempt State and Local)	
Imposition of Discriminatory or Excessive)	
Taxes and Assessments)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications)	
Act of 1996)	

**COMMENTS OF ARDEN
REALTY, INC.**

Arden Realty, Inc. ("ARI") submits these comments in response to the captioned Notice of Proposed Rulemaking ("Notice"), FCC 99-141, released July 7, 1999. ARI supports the comments filed by Apex Site Management, Inc. ("Apex") in this proceeding, and files separately to discuss the

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constitutional implications of mandated nondiscriminatory access to multiple-tenant premises (“MTPs”) raised in Section III.B.4 of the Notice.

Interest of ARI

Arden Realty, Inc. is a self-administered and self-managed real estate investment trust traded on the New York Stock Exchange (ARI). Based in West Los Angeles, ARI is a fully-integrated real estate company and the largest landlord of office buildings in Southern California. Since its initial public offering in October, 1996, Arden has acquired 127 properties, and increased its ownership square footage to approximately 18 million square feet in over 45 submarkets. Arden's properties are located in Los Angeles, Orange, San Diego, Ventura, San Bernardino, Riverside and Kern Counties. Arden's in-house operations include leasing, property and asset management, construction, development and re-development and acquisition.

Constitutional problems with mandatory access to MTPs cannot be mitigated under existing law.

In considering the reach of Section 207 of the Telecommunications Act of 1996 (“TA 96”), the Commission concluded that the Fifth Amendment to the U.S. Constitution – reading in part, “nor shall private property be taken for public use, without just compensation” – left the agency without authority to require access to “common and prohibited

access property” for the placement of devices designed to receive conventional TV, microwave (“MMDS”) or direct-broadcast satellite (“DBS”) video services.¹ For the same reasons discussed in that order, the Commission is powerless to mandate telecommunications access to the restricted and common areas – such as “riser” spaces and rooftops – in which wires, cables, antennas and other facilities today are typically deployed by agreement between communications providers and building owners. While certain forms of regulated access might be less offensive than others, no forcible third-party occupancy is free of constitutional impediment.

Prior occupancy. At ¶60 of the Notice, the Commission asks “would constitutional problems be mitigated if a requirement were tailored to apply only if the property owner has already permitted another carrier physically to occupy its property[?]” The New York statute mandating access to residential buildings for cable TV facilities, overturned in *Loretto v. TelePrompter Manhattan CATV Corp.*,² made no such distinction. While

¹ Second Report and Order, CS Docket 96-83, 13 FCC Rcd 23874, 23897 (1998). Of course, takings for public purposes that are justly compensated are not unconstitutional. The Commission was concerned, however, that ordering access to common areas would “create an identifiable class of *per se* takings” with “no compensation mechanism authorized by the statute.” *Id.* The FCC’s analysis followed *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994), hereafter “*Bell Atlantic.*”

² 458 U.S. 419, 73 L.Ed.2d 868 (1982).

the *Loretto* decision, therefore, did not discuss and does not answer the question of whether a landlord's previous consent to access makes a difference, the case contains some helpful hints.

It made no difference, for example, that Loretto's predecessor in title had granted access to TelePrompter. 73 L.Ed. 2d at 873. It was found "constitutionally irrelevant" that neither Loretto nor the prior owner had used the space occupied by the cable operator's rooftop and exterior-wall facilities. 73 L.Ed.2d at 884, n.16. Moreover, the Supreme Court, having already declared that *per se* taking through permanent physical occupation does not depend on the size of the space occupied, was clearly concerned that "in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made." 73 L.Ed.2d at 883. Finally, the Court's distinction between Teleprompter's "permanent occupation" of Loretto's property and the "temporary physical invasion" of shoppers in a mall rested on a broad invitation to the general public. 73 L.Ed.2d at 881. It did not say that the narrower contractual grant of access to a single provider must lead to similar contracts with all other providers.

For all these reasons, the seminal *Loretto* case does not support, but rather implicitly rejects, the notion that consent to one occupancy requires nondiscriminatory consent to each succeeding request.

Acceptable compensation. The Notice next asks whether mandatory access would be mitigated if the new entrant were to pay the landlord “the same compensation that it has voluntarily agreed to accept from an incumbent LEC.” There are at least two problems with this formulation of the issue. First, many if not most ILECs pay little or no compensation for access to MTPs, often grounding their refusal in some historic charter that treated telecommunications access as a *quid pro quo* in the public utility bargain of universal service from the monopoly ILEC. The Notice is attempting to continue moving us from the monopoly past into the competitive future, but neither the Congress nor the courts have yet abrogated generally the ILECs’ hundred-year-old agreements.

Second, for the same historic reasons, it cannot be assumed that a landlord with a building more than three years old (thus predating TA 96) has “voluntarily agreed” to the price and terms of an ILEC’s occupancy of his space. In neither case – the LEC’s free ride or the landlord’s essential inability to exclude incumbent public utilities – is there any guarantee of just compensation to the invaded owner.

Owner’s common wire. Finally, the Notice posits, in mitigation of constitutional difficulties, a wire owned and controlled by the landlord over which competing carriers could transport their individual signals. In this

scenario, the FCC suggests, “the competing carrier would not physically occupy the building owner’s property.” This conclusion appears to ignore an important teaching of *Loretto*, that the taking of an owner’s “right to exclude” others is still a taking, even if not a permanent physical occupation. The right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” 73 L.Ed.2d at 881, quoting *Kaiser Aetna v. United States*, 444 US 164, 176 (1979).

The demand for competitive access may
trigger a change in the investment
expectations of property owners.

The discussion above has focused on the so-called *per se* taking of permanent physical occupation, as in *Loretto*, since this appears to describe the access sought by petitioning competitive carriers. Assuming that an element of consent or some other factual distinction gives rise to a “regulatory taking,” the three-factor *Penn Central* test could come into play.³ One of these factors is the extent to which regulation interferes with “distinct, investment-backed expectations.” *Id.* At 124.

In its adoption of rules implementing Section 207 of TA 96, relating to the placement of video reception facilities, the Commission found support

³ *Penn Central Transportation Company v. City of New York*, 438 US 104 (1978).

in a recent appellate ruling upholding a Virginia law forbidding payment to landlords for permitting access to TV subscribers. The court said it would “strain credulity” to imagine that this loss of income would deprive building owners of their “reasonable investment-backed expectations.”

Indeed, there is no evidence in the record to suggest that at the time MDU owners purchased their respective properties, they expected to derive income from allowing cable television providers access to their tenants; from all accounts, the reasonable investment-backed expectations of the MDU owners were traditional, for example the collection of rent from unit tenants and future appreciation.⁴

While it remains true that communications rental proceeds are a comparatively small part of the revenue stream for most building owners, ARI submits that the emerging competitive environment – 20 providers or more in major metropolitan areas – no longer allows the easy assumption that investment-backed expectations do not include these dollars. To the extent this record, and the records of related administrative or legislative dockets, demonstrate that investors are looking for more than conventional rental income and property appreciation, the *Penn Central* test must be applied accordingly. This would render suspect any compensation that rests on mere cost recoupment in contrast to profitable market rental.

⁴ Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp., 65 F.3d 1113, 1124 (4th Cir. 1995).

The Section 224 analysis
in *FCC v. Florida Power*
must be revised.

At ¶¶41-44 of the Notice, the FCC tentatively concludes that Section 224 applies not just to utility poles and conduits on or under public rights-of-way but also to riser conduit, rooftops and other private property constituting rights-of-way controlled by utilities or capable of being characterized as part of the utility's distribution network.

ARI believes that this interpretation of Section 224 is overbroad. When Congress recently amended the section, it focused on changes to the rate formula and to terms of pole and conduit occupancy necessitated by a new environment in which incumbent power and telephone companies and cable TV operators would no longer be the sole users of the facilities. Most importantly, in light of the new local competition, Congress added a guarantee of access, Section 224(f), subject to reasonable considerations of capacity, reliability and safety arising from multiple occupancies. The legislative history is utterly silent on the extension of the statute to the private premises of end-users.

If the Commission nevertheless gives to Section 224 this broader reach, it must recognize the change in constitutional analysis required by new subsection (f), the guarantee of nondiscriminatory access. In *Florida*

Power, arising prior to TA 96, the utility had invited cable operators to lease space on its poles but complained of the FCC's allegedly confiscatory reduction of its rent. Justice Marshall used colorful language to distinguish this circumstance from *TelePrompter*'s uninvited occupancy of Ms. Loretto's building in New York City:

[I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.⁵

The formerly clear distinction is either removed completely, or at least rendered ambiguous, by Section 224(f)'s new guarantee of access. Now, every would-be commercial lessee is potentially an "interloper with a government license," empowered to demand access to a utility's cable risers, rooftop rights-of-way, easements, etc.

Building owners are not generally subject to the Communications Act nor are they within the particular jurisdiction of Section 224, which applies to utilities. However, owners understandably are concerned that telecommunications access which may not constitutionally be mandated from them will be secured from utilities whose historical presence on the owners' property is only theoretically consensual. If that happens, the Fifth

⁵ *FCC v. Florida Power Corp.*, 480 US 245, 252-53.

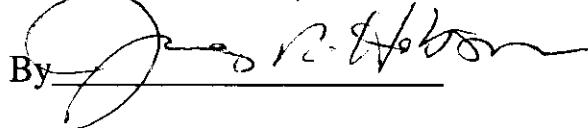
Amendment takings analysis must proceed on the *per se* basis of *Loretto*, as followed in *Bell Atlantic*,⁶ not the regulatory balancing test of *Penn Central*.

CONCLUSION

For the reasons discussed above, mandated nondiscriminatory access to owner and utility property in MTPs is fraught with constitutional problems that cannot be mitigated by the FCC under current law.

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⁶ The presence of a compensation formula in Section 224 would not necessarily save the FCC's extension of its jurisdiction to rooftop and riser rights-of-way. The utility holders of those rights would remain entitled to seek compensation for the difference between the results of applying the formula "and the level of compensation mandated by the Fifth Amendment." 24 F.3d at 1445, n.5 (citation omitted).